Supreme Court, U.S.
FILED

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No.

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IN THE

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, DAIRY CONFERENCE-USA AND CANADA,

Petitioners,

v.

TAYLOR MILK COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Unites States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

Whether Section 303(a) of the Labor-Management Relations Act creates a cause of action for damages based upon lawful, non-threatening, non-picketing conduct.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff in the United States District Court for the Western District of Pennsylvania was Taylor Milk Company, who filed this action for damages under Section 303(a) of the Labor-Management Relations Act of 1947, as amended. The defendants in the District Court were International Brotherhood of Teamsters, ALF-CIO, International Brotherhood of Teamsters, Dairy Conference-USA and Canada, and Service Personnel and Employees of the Dairy Industry Teamsters Local Union No. 205. Prior to trial, Service Personal and Employees of the Dairy Industry Teamsters Local Union No. 205 was dismissed as a defendant with the consent of all the parties.

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PETITION FOR A WRIT OF CERTIORARI

International Brotherhood of Teamsters, AFL-CIO, and International Brotherhood of Teamsters Dairy Conference-USA and Canada (hereinafter referred to collectively as "IBT") petitions for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Third Circuit which affirmed the finding by the United States District Court for the Western District of Pennsylvania of liability on the part of IBT under Section 303 of the Labor-Management Relations Act and the District Court's liability finding in its denial of IBT's Motion for Summary Judgment. The Court should grant certiorari and reverse the Decision below.

OPINION BELOW

The Decision of the United States Court of Appeals for the Third Circuit is published at 248 F.3d 239, and the Decision of the United States District Court for the Western District of Pennsylvania is unpublished but is appended hereto.

JURISDICTION

The Third Circuit's Decision was entered on May 1, 2001. On July 12, 2001, IBT's Application for an Extension of Time Within Which to File a Petition for Certiorari was granted by Justice Souter extending the time to and including September 28, 2001. IBT invokes this Court's jurisdiction under 28 U.S.C. §1254(a).

STATUTORY PROVISIONS

Section 303 of the Labor-Management Relations Act of 1947, as amended (hereinafter referred to as "LMRA"), 29 U.S.C. §187, provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or

conduct defined as an unfair labor practice in Section 158(b)(4) of this Title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of Section 185 of this Title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 8(b)(4)(B) of the LMRA, 29 U.S.C. §158(b)(4)(B), provides:

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents –

* * *

(4)(i) To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

* * *

(B) Forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any

> other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this Title: provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;....

STATEMENT OF THE CASE

IBT submits this Petition to obtain review of a Decision by the Third Circuit affirming the Decision of the United States District Court on liability and in the denial of IBT's Motion for Summary Judgment. The Third Circuit remanded the District Court's Decision on damages in response to the appeal filed by Taylor Milk Company (hereinafter referred to as "TMC"), which is currently pending.

TMC filed this action against IBT and Service Personnel and Employees of the Dairy Industry, Teamsters Local Union No. 205 (hereinafter referred to as "Local 205")[1], for damages under Section 303 of the LMRA. This section creates a cause of action for damages based upon a labor organization's violation of the secondary boycott provisions of Section 8(b)(4) of the LMRA, 29 U.S.C. §158(b)(4). TMC's cause of action was based upon the allegation that IBT violated Section 8(b)(4)(ii)(B).

In a non-jury bifurcated trial, District Judge D. Brooks Smith found that the IBT violated Section 8(b)(4)(ii)(B) and awarded damages to TMC in the amount of $50,000.00, plus pre-judgment interest.

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1 Prior to trial, Local 205 was dismissed as a party with the consent of all the parties.

In IBT's appeal to the Third Circuit, IBT contended, *inter alia*, that the conduct upon which the Court found to be violative of Section 8(b)(4) was not a secondary boycott as a matter of law.

In the late summer of 1995, TMC entered into negotiations to purchase a fluid milk plant located in Youngstown, Ohio, which was then owned and operated by Borden, Inc. TMC was located in Ambridge, Pennsylvania, and its employees were represented by Local 205. Borden's employees were covered by collective bargaining agreements with Teamsters Local 377.

The District Court and the Third Circuit found that IBT Dairy Conference Director, Fred Gegare, "coerced" Borden by preventing Teamsters Local 377 from re-opening their existing collective bargaining agreements and agreeing to new five-year agreements. The Court found that there were three meetings between Borden and Local 377. At the first meeting on September 1, 1995, Borden presented Local 377 with a proposal which Local 377 Business Agent, Eben Byers, characterized as "ridiculous". The second meeting was held on September 15, 1995, at which time Borden told Local 377 that "it planned to close the plant". (Appendix, p.26a). On October 2, 1995, a third meeting occurred at which time Gegare presented Borden with a counter-proposal. Borden rejected the counter-proposal indicating that the plant would close.

IBT submits that the facts, as found by the Court, do not support the conclusion that IBT engaged in a secondary boycott. IBT contends that there is no evidence that the IBT ever coerced Borden to cease doing business with TMC.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE THIRD CIRCUIT IS IN DIRECT CONFLICT WITH THE PRINCIPLES ESTABLISHED BY DECISIONS OF THIS COURT AND THE INTENT OF CONGRESS

The Third Circuit panel, by affirming the District Court finding that the conduct of the IBT violated Section 8(b)(4) of the LMRA, created a new cause of action out of thin air contrary to Congressional intent and the rulings of this Court interpreting Section 8(b)(4).

Section 303 was created to provide employers who are damaged as a result of union secondary boycott activities to recover their losses. Neither the District Court nor the Third Circuit panel explained how Gegare's conduct could possibly be construed as "coercive".

The District Court held (Appendix pgs. 29a –30a):

> Here, the question is whether, under the facts as I have found them, defendants coerced Borden not to sell the Youngstown plant to Taylor.
>
> I note at the outset that this is not the paradigmatic case of coercion. The IBT, after all, did not threaten to picket Borden's plant unless it refused to sell Taylor the Youngstown facility. Rather, the IBT used its influence with Local 377 to prevent that Local from successfully negotiating a CBA with Borden, a CBA that had to be in place before the Borden-Taylor sale could be consummated. Although the IBT's conduct may have been outside the everyday mine run of secondary boycott cases, I nevertheless conclude it was coercive.

> Gegare's statement that Borden should find another buyer, standing alone, might well be considered merely persuasive. But here, Gegare went much further, invoking Article 12 of the IBT Constitution and preventing Local 377 from negotiating with Borden until he could be present. Local 377's letter, sent in an attempt to obtain clarification from the IBT, went unanswered. Once he arrived, Gegare presented a clearly unreasonable plan on Local 377's behalf, which Borden predictably rejected. Gegare then refused to permit Byers to negotiate further. At that point, the deal was dead and the plant was to be closed. The impact of this conduct – not to mention its intent – was to apprise Borden in no uncertain terms that, if it did not end its discussions with Taylor concerning the sale of the Youngstown plant, the IBT would simply make it impossible for Borden to obtain the CBA that was needed to permit the sale to close. This was "pressure of a compelling or restraining nature..." sufficient to constitute coercion, and it achieved its goal. A reasonable seller, faced with the IBT's position and losing money on its plant's operations every month, could certainly be expected to do exactly what Borden did: sell the plant to another buyer who wanted only the plant's customer list. This is particularly true given that Borden is a nationwide dairy and Gegare is the Dairy Conference Director of the IBT, a man with whom Borden would surely have to deal in the future and whose animus it likely did not wish to kindle. Accordingly, I conclude that plaintiff has proved the element of coercion by a preponderance of the evidence.

The District Court simply stated its conclusion that IBT coerced Borden without making any specific factual findings to

support that conclusion. Although the District Court found that Gegare refused to permit any further negotiations, this finding is inconsistent with the other findings that Borden informed Local 377 on September 15, 1995, and October 2, 1995, that it was closing the plant. The District Court recognized that Borden's unreasonable initial proposal was only an "opening position...subject to further negotiation". (Appendix, p. 26a). However, Gegare's proposal on behalf of Local 377, after Borden announced its decision to close the plant, was somehow deemed to be responsible for Borden's decision.

Gegare's conduct may be criticized by the Court, but characterizing it as coercive within the meaning of Section 8(b)(4) is clearly beyond anything ever anticipated by Congress. Gegare's conduct does not constitute a secondary boycott. Congress sought to protect neutral employers from secondary boycotts not to provide an expansive remedy to employers who feel injured as a result of conduct considered unreasonable.

In *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964), this Court stated at 53-54:

> It had been held that Section 8(b)(4)(A) did not reach threats of labor trouble made to the secondary employer himself. Congress decided that such conduct should be made unlawful, but only when it amounted to conduct which "threaten[s], coerce[s] or restrain[s] any person"; hence the addition of subsection (ii). The careful creation of separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals from other ends which are attended by threats, coercion or restraints, argues conclusively against the interpretation of subsection (i) as reaching the Local's

> appeals to the supermarket managers in this case. Where subsection (i), in addition to prohibiting inducement of employees to withhold employment services, also reaches an appeal that managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, subsection (ii) would be almost superfluous. Harmony between (i) and (ii) is best achieved by construing subsection (i) to prohibiting inducement of the managers to withhold their services from their employer and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would "threaten, coerce, or restrain" that exercise. (Footnotes omitted).

The District Court in the instant case combined subsections (i) and (ii) of Section 8(b)(4) to find that coercion of Local 377 constituted coercion to Borden. This completely ignores the distinction between (i) and (ii). Local 377 is not a neutral employer within the meaning of Section 8(b)(4)(ii). Subsection (i) relates to inducement of employees to strike or refuse to handle goods of a neutral employer and subsection (ii) relates to direct coercion or restraint or the neutral employer. The facts found by the Court do not fit into either of these categories.

In *DeBartolo v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), this Court limited the expansive interpretation of Section 8(b)(4) adopted by the National Labor Relations Board. The Court stated at 577-578:

> In *NLRB v. Drivers*, 362 U.S. 274, 284, 80 S.Ct. 706, 4 L.Ed.2d 710 (1960), for example, the Court rejected the Board's interpretation of the phrase "restrain or

coerce" to include peaceful recognitional picketing and stated:

"In the sensitive area of peaceful picketing, Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. Therefore, unless there is the clearest indication in the legislative history of Section 8(b)(1)(A) supporting the Board's claim of power under that section, we cannot sustain the Board's Order here. We now turn to an examination of the legislative history." That examination of the legislative history failed to yield the requisite "clearest indication". Similarly, in *NLRB v. Fruit Packers*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964) (Tree Fruits), we disagreed with the Board's determination that Section 8(b)(4)(ii)(B) prohibited all consumer picketing at a secondary establishment, no matter the economic consequences of that picketing, because our examination of the legislative history led us to "conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading" customers not to purchase a specific product of the secondary establishment. We once more looked for the "isolated evils" that Congress had focused on because "[b]oth the Congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment". *Id.* at 62-63, 84 S.Ct., 12 L.Ed.2d 129; see, *Id.* at 67, 71, 84 S.Ct. 1063, 12 L.Ed.2d 129. Because there was not the required "clearest indication in the legislative history", we rejected the

> Board's interpretation that limited expressive activities.

In the instant case, there is no "clearest indication in the legislative history" of Section 8(b)(4) that Congress ever intended the kind of conduct in the instant case to be considered restraint or coercion. The Court in *DeBartolo* further stated at 578:

> The case turns on whether handbilling such as involved here must be held to "threaten, coerce or restrain any person" to cease doing business with another, without the meaning of Section 8(b)(4)(ii)(B). We note first that "induc[ing] or encourag[ing]" employees of the secondary employer to strike is proscribed by 8(b)(4)(i). But more than mere persuasion is necessary to prove a violation of 8(b)(4)(ii): that section requires a showing of threats, coercion, or restrains. Those words, we have said are "non-specific, indeed vague" and should be interpreted with "caution" and not be given a "broad sweep", *Drivers, supra*, Act 290, 80 S.Ct. 706, 4 L.Ed.2d 710; and in applying Section 8(b)(1)(A) they are not to be construed to reach peaceful recognitional picketing. Neither is there any necessity to construe such language to reach the handbills involved in this case. There is no suggestion that the leaflets had any coercive effect on customers of the Mall, there was no violence, picketing or patrolling and only an attempt to persuade customers not to shop in the Mall.

Contrary to this Court's ruling, the District Court and the Third Circuit have adopted a broad sweeping interpretation of the concept of coercion within the meaning of 8(b)(4). Such an interpretation opens up the federal courts to lawsuits in areas never contemplated by Congress nor predictable by labor

unions. The Decision of the Third Circuit is not merely wrong but rather constitutes dangerous precedent which threatens to expand the limited role of the courts in labor-management matters. It would be impossible for labor unions to be able to predict what the courts might view as "coercive" if this Decision is allowed to stand.

CONCLUSION

For the reasons stated herein, this Court should grant Certiorari and reverse the Decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 00-1598 and 00-1616

Filed May 1, 2001

TAYLOR MILK COMPANY, a Pennsylvania Corporation,
Appellant in No. 00-1598

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, an unincorporated association and labor organization; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, DAIRY CONFERENCE - USA AND CANADA, an unincorporated association and labor organization; SERVICE PERSONNEL AND EMPLOYEES OF THE DAIRY INDUSTRY TEAMSTERS LOCAL UNION NO. 205,
an unincorporated association and labor organization

TAYLOR MILK COMPANY, a Pennsylvania Corporation

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, an unincorporated association and labor organization; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, DAIRY CONFERENCE - USA AND CANADA, an unincorporated association and labor organization; SERVICE PERSONNEL AND EMPLOYEES OF THE DAIRY INDUSTRY TEAMSTERS LOCAL UNION NO. 205,
an unincorporated association and labor organization

International Brotherhood of Teamsters, AFL-CIO;
International Brotherhood of Teamsters, Dairy
Conference-USA and Canada,
Appellants in No. 00-1616

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civil Action No. 95-cv-01663)
District Judge: Honorable D. Brooks Smith

Argued February 8, 2001

BEFORE: SCIRICA, MCKEE and STAPLETON,
Circuit Judges

(Opinion Filed May 1, 2001)

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Taylor Milk Company ("TMC") brought suit against the International Brotherhood of Teamsters ("IBT"), the IBT Dairy Conference of the USA and Canada ("Dairy Conference"), and its own IBT Local Union No. 205 ("Local 205") (collectively "IBT") for unfair labor practices in violation of 29 U.S.C. § 187. TMC alleged that appellees violated the prohibition against secondary boycotts by coercing a neutral party into not doing business with TMC. The District Court found that the appellees had committed such unfair labor practices and awarded TMC damages in the amount of $50,000. TMC appeals this damage award as too low. IBT cross-appeals the District Court's denial of summary judgment and determination of liability.

I.

TMC was located outside of Pittsburgh in Ambridge, Pennsylvania.[1] In 1995, TMC was operating at a net loss caused by meeting the demands of a customer base that exceeded the processing and delivery capacities of the Ambridge facility. During this same time, Borden, Inc., the well-known national dairy company, had determined that it would abandon the fluid milk business east of the Mississippi River. Borden operated a fluid milk plant in Youngstown, Ohio, which is about an hour's drive northwest of Ambridge. The Borden plant had an insufficient customer base and was slated to be sold.

In August of 1995, TMC entered into negotiations to purchase this plant from Borden. TMC paid Borden $50,000 in order to gain the exclusive right to purchase the facility. Joseph Taylor, the president of TMC, hoped that by shifting production operations to Borden's Youngstown plant, TMC would be able to turn a profit. The Borden Youngstown facility was generally a superior facility from an operational standpoint and the wages paid to the Youngstown production workers were significantly less than those paid to the workers in Ambridge. TMC planned to eliminate the Ambridge production jobs after acquiring the Youngstown facility but to keep the Ambridge plant as a distribution facility.

The stipulated purchase price for the Youngstown facility was approximately $1,200,000. The finalization of the agreement, however, was dependent upon TMC first obtaining bank financing for the deal. The bank financing was in turn contingent upon the existence of a stable, long-term collective

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[1] TMC has now ceased operations.

bargaining agreement ("CBA") between Borden and its labor force, which TMC would then assume.

Toward its goal of forming such an agreement, TMC traveled to Youngstown to meet with the Borden's Youngstown employees, represented by Teamsters Local 377 ("Local 377"), and Eben Byers, the union's business agent. TMC proposed a new CBA with moderate increases in wages and benefits. Local 377 seemed responsive to these proposals, though Byers noted that since Borden was the employer of Local 377, any current agreement needed to be negotiated with Borden rather than TMC. Byers understandably hoped that some agreement could be worked out with TMC so that Local 377's members could remain employed following Borden's sale of the Youngstown facility.

On August 25, 1995, representatives from Local 205 and TMC met at a hotel. Local 205 was represented by its principal officer, William Lickert. Local 205 had somehow become aware of TMC's plans to shift production jobs to Youngstown and terminate workers at Local 205. Local 205 had invited the Chairman of the Teamster's Dairy Conference, Fred Gregare, to the meeting in order to negotiate in its interest and preserve the jobs of workers at Local 205.

The facts of the meeting are in dispute, but it is clear that there were strong words exchanged. Joseph Taylor began the meeting by announcing TMC's intentions to relocate production jobs. William Lickert responded by waving a copy of the union's CBA and stating that Local 205 had the contractual right to "follow its work" to the Youngstown facility.

Lickert asserted that a no-subcontracting clause in the CBA prevented TMC from implementing its plan to shift production to Youngstown. The CBA specified that "all dairy products . . . shall be manufactured, processed, packaged *and/or handled*

by the Employer's employees .. . . No work or services presently performed or hereafter assigned to the collective bargaining unit . . . will be subcontracted . . . ." (emphasis added). TMC maintains that this provision was not dispositive of the plan, since Local 205 would still "handle" the products which were manufactured in Ambridge and an exception clause excluded ice cream and some other products from the scope of this provision.

Discussions deteriorated further. Gregare, chairman of the Teamster's Dairy Conference, then stated that he was "implementing Article 12, Section 2" of the Teamster Constitution and "giving jurisdiction of the Borden Youngstown plant to Local 205." (The parties now agree that section 2 of Article 12 conferred no such authority.) Gregare instructed Borden to sell the plant to someone else.[2] The meeting ended soon thereafter.

Gregare sent follow-up letters to Borden's Local 377 stating that section 2 of Article 12 of the Teamster's Constitution was being implemented. Gregare further stated that he was requesting in accordance with section 2 of Article 12 that prior approval be granted before Local 377 ratified any collective bargaining agreement. Gregare then contacted Byers directly by telephone and told Byers not to renegotiate the Local 377-Borden contract but to listen to any proposals and fax them to Gregare. At trial, Gregare admitted that he had no authority to require Byers to obtain his approval before re-negotiating a contract. The District Court found that Byers complied with this directive out of fear that Local 377 would be placed in trusteeship if Byers disobeyed Gregare's orders.

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[2] At trial, Gregare denied invoking Article 12, Section 2, denied awarding jurisdiction to Local 205, and denied telling Borden to sell its plant to someone else. The trial court credited none of these denials.

On September 1, Borden offered a CBA proposal to Local 377 that Byers considered "ridiculous" but that would have normally served as the basis for a counter-proposal from Local 377. Per Gregare's instructions, Byers forwarded the proposal to Gregare and did not respond to the offer. Local 377 instead sent a letter to Gregare's superiors asking whether Gregare truly had authority to negotiate on behalf of Local 377 and requesting permission to proceed with negotiations. No response was received. On September 15, Borden again met with Byers and informed Byers that Borden would have to close the plant. Byers continued to follow Gregare's instructions not to negotiate. Borden concluded that dealing with Byers was not effective and that Borden would have to deal with Gregare directly. On October 2, Borden met with Gregare on Gregare's home base in Wisconsin. Byers was present for "a very short meeting," but was then excluded from negotiations, which were conducted only by Gregare and Borden. When negotiations were finished, Gregare informed Byers that a counter-proposal had been made, that the counter-proposal had been rejected, and that the plant would close. Byers expressed a desire to continue negotiations but Gregare refused to negotiate further. Consequently, the deal between TMC and Borden fell through and the Youngstown plant was closed. All Local 377 employees at the Youngstown facility were terminated.

TMC filed suit against IBT under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187(a), seeking damages for an alleged violation of the secondary boycott provisions codified at 29 U.S.C. § 158(b)(4). The District Court bifurcated the damage and liability trials. The trial court found that the defendants were liable for violating 29 U.S.C. § 158(b)(4) and entered judgment for TMC in the amount of $50,000 plus prejudgment interest. TMC appeals the damages verdict, alleging that it was entitled to a larger damages award. IBT

cross-appeals the liability verdict, asserting that 29 U.S.C. § 158(b)(4) was never violated.

The District Court had jurisdiction over this case pursuant to 29 U.S.C. § 187 and 28 U.S.C. § 1331. Our appellate jurisdiction is pursuant to 28 U.S.C. § 1291. Factual findings of the District Court are reviewed for clear error. *Sheet Metal Workers Local 19 v. 2300 Group*, 949 F.2d 1274, 1278 (3d Cir. 1991). The District Court's application of legal precepts is subject to plenary review. *Holmes v. Millcreek Tp. Sch. Dist.*, 205 F .3d 583, 589 (3d Cir. 2000).

II.

1. Liability

Local 205 and IBT state that they did not violate 29U.S.C. § 158(b)(4)(ii)(B), and that the District Court erred by concluding that they did so. That statute provides, in applicable part:

> (b) **Unfair labor practices by labor organization.** It shall be an unfair labor practice for a labor organization or its agents--
>
> (4) . . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is–
>
> . . . .
>
> (B) forcing or requiring any person . .. to cease doing business with any other person, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

29 U.S.C. § 158(b)(4).

We have summarized the purpose of the secondary boycott provision in our opinion in *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1249-50 (3d Cir.1991).

> Section 8(b)(4)(ii) of the NLRA prohibiting secondary boycotts by unions essentially prohibits union conduct designed to force a primary employer (the employer with which the union has a dispute) to bargain with a union or to force a neutral employer (an employer with which the union has no dispute) to cease doing business with the primary employer. The proscribed methods used to achieve the objectives include threatening, coercing, or restraining the secondary employer. See, e.g., *Soft Drink Workers Union Local 812 v. NLRB*, 212 App. D.C. 10, 657 F.2d 1252 (D.C. Cir. 1980). Coercion can include economic pressure upon the neutral party. *Allentown Racquetball & Health Club, Inc. v. Building and Constr. Trades Council of Lehigh and Northampton Counties*, 525 F. Supp. 156 (E.D. Pa. 1981). The purpose of the prohibition against secondary boycotts is to shield unoffending employers from pressures in disputes not their own, though preserving the rights of unions to bring pressure to bear on offending employers in primary labor disputes. *Anderson v. International Bhd. of Elec. Workers, Local No. 712, AFL-CIO*, 422 F. Supp. 1379 (W .D. Pa. 1976).

Id.

The District Court found that IBT violated this section when Gregare, representing the interests of Local 205, usurped Local 377's place in negotiations to prevent Borden from continuing negotiations with TMC. The District Court concluded that Borden was a neutral third party and that Gregare's actions, in preventing negotiations between Local

377 and Borden, forced Borden to cease doing business with TMC. IBT argues that this was an erroneous decision for a number of reasons.

First, IBT suggests that because Local 377 was within its rights in "following Gregare's advice" and deciding not to negotiate with Borden, there was no unlawful activity. This ignores the *Limbach* rule that we look to the intention of the parties in coercing neutral parties, not to the general rights of parties to take particular actions. *See id.*, 949 F.2d at 1252-53 (stating that the exercise of legitimate rights may be unlawful if exercised "for the purpose of applying economic coercion to achieve a prohibited secondary objective"). IBT suggests that Gregare was operating in the best interest of Local 377 in rejecting its offer, but this is contrary to the facts found by the District Court. The District Court found that Gregare was not operating in the interests of Local 377, but was instead interfering in the negotiations between Local 377 and Borden towards the end of preventing Borden from continuing in its business negotiations with TMC. This determination has adequate support in the record.

Second, IBT suggests that Gregare could not have exerted coercive economic influence on Borden because Borden never intended to negotiate an agreement with Local 377. For the same reason, IBT suggests that it was not the proximate cause of any damages, since Borden would not have sold the facility to TMC. Again, there is no clear error in the District Court's determination that this was not the case. The District Court credited the testimony of Byers that Borden's initial offer did not indicate an unwillingness to negotiate but instead constituted an initial"wish-list" which, through the process of negotiation, could have led to more reasonable terms.

Third, IBT suggests that the District Court erred by concluding that Borden was a neutral party because Borden was

operating as the alter-ego of TMC. Therefore, IBT argues, any coercive pressure applied against Borden was legitimate, since it was directed against TMC, not Borden. The test of whether two employers constitute a "single entity" under the secondary boycott provisions of the LMRA is based on: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelationship of operations. *Boich Mining Co. v. NLRB*, 955 F.2d 431, 434 (6th Cir. 1992). The District Court did not err by concluding that Borden and TMC were not a "single entity" under this test.

Insofar as Local 205 is merely suggesting that it was in TMC's interest that Borden obtain a CBA with Local 377, it is also true that successful negotiations were in Borden's interest as well. Just because the interests of TMC and Borden were aligned does not mean that Borden and TMC were the same entity for the purposes of the LMRA's secondary boycott provisions. It is axiomatic that business relationships exist in those cases where such relationships operate to the mutual benefit of parties.

Fourth, IBT suggests that Borden was not "doing business" with TMC because this was a case involving the sale of a single asset. This is relevant because if TMC and Borden were not doing business, it would be impossible for IBT to have coerced them to cease doing business in violation of 29 U.S.C. § 158(b)(4)(ii)(B). IBT cites *Amax Coal Co. v. NLRB*, 614 F.2d 872, 885-86 (3d Cir. 1980), where this Court stated:

> The phrase "doing business" refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union demands. Thus, as noted earlier, Section 8(e) was designed to protect neutral employers and their employees, not involved

> in a labor dispute, from being pressured to assist a union in a dispute with another employer.

In *Amax*, a union sought to bind its primary employer to a commitment that any successor to the operation would abide by the terms of the current bargaining agreement. This Court held such proposed successorship arrangements do not constitute interference in "doing business." The Court also held in the alternative that "even if the conveyance of a portion of Amax's coal mining operations. . . constituted 'doing business' " the fact that the employees of both businesses were identical made this a primary rather than secondary boycott. *Id.* at 886.

The District Court concluded that *Amax* did not apply to this case because a trademark licensing provision in the proposed contract of sale between Borden and TMC envisioned a continuing business relationship over several years. IBT challenges this conclusion. It stressed that it had no knowledge of the proposed trademark licensing agreement and that, therefore, it could not have had as its "object" the disruption of such a business relationship. 29 U.S.C. § 158(b)(4)(ii). This point is well-taken. Because no finding was made below that IBT was aware of the trademark licensing provision, we cannot affirm the District Court's decision on this basis.

We conclude, however, that the District Court's decision on this issue can be affirmed on the alternative ground that a continuing long-term negotiation over the purchase of a new asset from a neutral party meets the "doing business" requirements of 29 U.S.C. § 158(b)(4). As we stated in *Limbach*, the secondary boycott provisions are directed at preventing a union from leveraging a neutral third party's relationship with a primary employer in order to force the primary employer to accede to the union's demands. *Limbach*, 949 F.2d 1249-50. This clearly happened in the present case. Gregare disrupted Borden's negotiations with Local 377 with

the objective of preventing TMC from negotiating to purchase the Borden facility. Gregare's ultimate goal was to prevent TMC from cutting Local 205's production jobs at Ambridge.

Amax, upon which IBT relies, is not helpful here. In *Amax*, no third party had yet appeared on the scene. Therefore, in *Amax*, no neutral party could be leveraged in order to aid the union in its primary dispute. Here a third party did exist and was indeed successfully leveraged to allow IBT to achieve its primary objective. Accordingly, we will affirm the District Court's decision on the issue of liability.

2. Damages

TMC alleges that it was damaged to the extent that it lost the benefit of purchasing the Youngstown facility. TMC claims that had it purchased the Borden facility and cut production jobs at Ambridge, it would have made a profit from the resulting synergies. While the District Court characterized the exact calculations of Joseph Taylor and TMC's expert witnesses as "rosy," it apparently accepted that some profits would have been likely to result from this plan, dubbed "Plan A" by Taylor. Plan A, however, was based on the premise that the CBA between Local 205 and TMC would be interpreted at arbitration to permit milk production jobs to be moved to Youngstown.

Joseph Taylor testified that even if the CBA had been interpreted in favor of Local 205, he would have still purchased the Youngstown facility. Taylor had two contingency plans based on this eventuality, and Joseph Taylor testified some profits would have occurred under these two contingency plans (dubbed "Plan B" and "Plan C").

Damages here are claimed pursuant to 29 U.S.C. § 187(b). That statute states:

> Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of [29 U.S.C. § 185] without respect to the amount in controversy, . . . and shall recover the damages by him sustained and the cost of the suit.

It is axiomatic that in the typical case "plaintiff bears the burden of proving every element of his case, including damages." *Rochez Bros. v. Rhoades*, 527 F.2d 891, 894 (3d Cir. 1975). Violations of 29 U.S.C. § 158(b)(4)(ii) sound in tort, and are in the nature of interference with advantageous economic relations. *Allied Int'l v. International Longshoreman's Ass'n*, 814 F.2d 32, 40 (1st Cir. 1987). The statute here, 29 U.S.C. § 187(b), requires proof of injury "by reason" of an unfair labor practice. These two words must be read as requiring that TMC prove some causal nexus between IBT's activities and an injury TMC has suffered. *Tresca Bros. Sand & Gravel v. Truck Driver's Union, Local 170*, 19 F.3d 63, 65 (1st Cir. 1994); *Feather v. UMW & Dist. 2*, 711 F.2d 530, 538 (3d Cir. 1983).

TMC points out, correctly, that if it has proven that some damage occurred, a District Court is permitted to award an amount of damages that is "to some extent imprecise." *Scully v. US Wats, Inc.*, 238 F.3d 497, 515 (3d Cir. 2001). All that is required is that sufficient facts be introduced for a court to arrive at an intelligent estimate without speculation or conjecture. Id. "[T]he law does not command mathematical preciseness from the evidence in finding damages. . . ." *Rochez*, 527 F.2d at 895.

Although the District Court did characterize TMC's damages claim as speculative, TMC mistakenly attributes the District Court's uncertainty to an inability to fix a precise

amount of damages. Rather, the District Court was skeptical as to whether TMC had suffered damages at all, making the cases cited by TMC inapplicable. See *Kemmerer v. ICI Ams., Inc.*, 70 F.3d 281, 290 (3d Cir. 1995) (finding that where "the very existence of damages" is in dispute, equitable principles do not compel a damages award); *Blanche Road Corporation v. Bensalem Township*, 57 F.3d 253, 265 (3d Cir. 1995).

Our review of the record reveals that the District Court did not commit clear error insofar as it found that TMC had failed to prove the profitability of Plan B and Plan C. TMC was, however, entitled to a determination of whether it could have implemented Plan A. If it was likely that Plan A would have been successfully implemented, TMC would presumably have suffered some damages. To determine if Plan A could be implemented, the District Court was required to examine all the evidence before it, including the text of the CBA.

It is not clear that the District Court made such an examination. Instead, the District Court declared that it would be usurping the role of the arbitrators if it interpreted the relevant portion of the CBA. The District Court then relied on the following testimony of TMC's labor counsel:

> If the whole thing hinged just on winning that arbitration, if it was a gamble, throwing the dice or the turn of the cards, on that alone, it would have been chancie [sic] at best under the circumstances at which we would have gone to the arbitration table. The language was definitely in favor of Taylor Milk's position. The "otherwise handled" language. However, there were no attorneys permitted unless both sides agreed. There were named arbitrators. And I believe had we had ad hoc arbitration with attorneys present, we would have had an excellent chance of winning. Under the burden under which we labored

> under that contract, I think it would have been a good possibility of winning, but it would not have been a sure thing by any means.

Apparently, based upon the attorney's opinion that the arbitration would be chancy and that there would have been "a good possibility" of winning, the District Court concluded that TMC had "proved only that it had some possibility of winning an arbitration but not that a victory was assured or even likely." We find two legal errors in the District Court's analysis.

First, because TMC was entitled to prove damages, the District Court was required to determine whether it was more likely than not that TMC would have won the arbitration. The District Court could not have done this without considering the disputed text of the CBA. The District Court erred insofar as it concluded that it was precluded from considering the CBA because the parties had agreed to arbitrate and it was not proper for the District Court to opine as to the outcome of arbitration. To the contrary, it is not uncommon for a District Court to be called upon to determine what the result of a dispute resolution process would have been if one party had not forgone the opportunity to seek arbitration.[3]

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[3] TMC was required by law to establish by a preponderance of the evidence that it would have suffered damages. Given the District Court's determination that TMC did not carry its burden of proving the feasibility of Plans B and C, TMC was required to prove it would have prevailed in the arbitration in order to prove damages. Only if Plan A was feasible could TMC have suffered from the loss of the ability to implement plan A. Thus, some analysis of the likely outcome of arbitration was required. Local 205 was the only defendant that could have required arbitration of this issue and its failure to do so should not operate to the detriment of TMC.

Second, we conclude the District Court erred insofar it relied exclusively on the testimony of TMC's counsel to conclude that TMC was not likely to prevail. In fact, the testimony was consistent with the proposition that an arbitration victory for TMC was more likely than not. Although TMC's counsel did suggest that arbitration was chancy, he later stated that TMC had a "good possibility of winning." We do not see how these remarks, taken as a whole, can be interpreted as suggesting that it was unlikely that TMC would have prevailed at arbitration.

We also note that the District Court awarded $50,000 to TMC in damages. This amount is equal to the amount paid by TMC to Borden for the exclusive right to purchase the Youngstown plant. At the same time, the District Court denied TMC $162,000 in out-of-pocket expenses associated with TMC's efforts to purchase the facility. Both parties are correct in arguing that this award was erroneous as it appears internally inconsistent to award one sunk cost associated with TMC's right to purchase the Borden facility yet deny other sunk costs related to the same transaction.

In the interest of administrative economy, we will clarify what we feel to be the correct legal analysis in relation to these expenses. If, upon remand, the District Court determines that TMC would not have prevailed at arbitration and maintains its determination that Plans B and C would not have been profitable, it is clear that TMC could have suffered no damage from IBT's actions, as the loss of TMC's right to purchase the Borden plant would have placed it in no worse of an economic position than if it had purchased the plant. In other words, if

TMC could not have profited from purchasing the Borden plant, there can be no basis for awarding TMC damages.[4] If, on the other hand, TMC can prove to the District Court's satisfaction that it would have consummated Plan A and made a profit, then the exclusive purchase option and the out-of-pocket expenses associated with that purchase cannot be directly recovered. Instead, they should be factored as expenses counted against any calculation of future profits.

III.

For the above reasons, we will reverse the District Court's judgment and remand this matter to the District Court for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[4] The District Court characterized the $50,000 as money which TMC "indisputably lost." Though this is true, the statute is explicitly limited to losses which occur by reason of the defendant's unfair labor practices. Even had IBT not violated the law, TMC would never have recovered the cost of its purchase option. Plaintiff's characterization of this award as "restitution" is both novel and erroneous. A theory of restitution could not justify such an award, as IBT was never unjustly enriched by TMC's payment. *See ATACS Corp. v. Trans World Communs.*, 155 F.3d 659, 669 (3d Cir. 1998) ("Accordingly, restitution damages will require the party in breach to disgorge the benefit received by returning it to the party who conferred it.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 95-1663

TAYLOR MILK COMPANY,
a Pennsylvania Corporation,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO,
an Unincorporated Association and Labor Organization,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
DAIRY CONFERENCE-USA AND CANADA,
an Unincorporated Association and Labor Organization,

Defendants.

MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, District Judge

Taylor Milk Company ("Taylor") sued the International Brotherhood of Teamsters and its Dairy Conference (collectively the "IBT" or "Teamsters"), alleging that the IBT engaged in prohibited secondary activity in violation of § 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4) and seeking damages under § 202 of the Labor Managements Relations Act, 28 U.S.. § 187. I denied defendants' motion for summary judgment, *Taylor Milk Co. v. International Bhd. of Teamsters*, 988 F. Supp. 881 (W.D. Pa. 1997), and held a four-day bench trial limited to the issue of liability. The following memorandum constitutes my findings of fact and conclusions of law under Fed. R. Civ. P. 52(a). For

the reasons set forth herein, I conclude that the Teamsters violated the NLRA and are liable to Taylor. Accordingly, I will schedule this matter for trial on the issue of damages.

I.

The undisputed evidence at trial showed that plaintiff, a privately held family-run dairy was in the business of manufacturing and distributing various milk products for many years from its plant in Ambridge, Pennsylvania. Tr. I, at 25-26. its workers were represented under a collective bargaining agreement by Teamsters Local 205, under the leadership of William Lickert, Sr., and his son, William Lickert, Jr. Tr. III, at 77. The CBA contained a no-subcontracting clause, which provided, in pertinent part:

> All dairy products . . . shall be manufactured, processed, packaged and/or handled by the employer's employees who shall be covered by the terms of this Agreement. . . . No work or services presently performed or hereafter assigned to the collective bargaining unit . . . will be subcontracted, transferred, leased or assigned, in whole or in any part to any other person, firm or corporation or non-unit employees unless otherwise expressly provided in this Agreement.

DX A, § 6(a), at 9 (emphasis added).[1] In 1995, the union successfully grieved under this provision to prevent another company from delivering small amounts of Taylor fluid milk to a nursing home. DX C.

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[1] In this memorandum, I will use "PX" to refer to plaintiff's exhibits and "DX" to refer to those of defendants. I will cite trial testimony with the prefix "Tr." followed by a Roman numeral indicating the day of trial and finally the page number in the transcript. Thus, "Tr. II, at 36" would refer to page 36 of the second day of trial.

By 1995, plaintiff's Ambridge plant was old, outdated and losing money, although it had a good customer base. Tr. I, at 35-38; 41; Tr. II, at 74-75. At the same time, Borden, Inc., was in the process of selling off all of its milk plants in the Eastern United States. Tr. I, at 34-35. One of those plants was located in Youngstown, Ohio. *Id.* It, too, was losing money, but only because it lacked sufficient customers. *Id.* at 41. The plant itself was an efficient operation, in part because of a more modern design than the Ambridge plant. *Id.* at 35; Tr. II, at 78. Its employees were represented under a CBA with Teamsters Local 377, Tr. II, at 5; an agreement somewhat more employer-favorable than Local 205's CBA. *See* DX A, DX, B, DX Z, DX AA.

Taylor thus saw a "once in a lifetime" opportunity in 1995 to purchase the Borden plant and move its production there, then ship the finished product back to Ambridge and have it delivered to customers from there under the Borden trademark.[2] Tr. I, at 48-49. Taylor's president, Joseph Taylor ("Mr. Taylor"), felt certain that the synergies of combining the best aspects of both plants would result in a profitable operation. *Id.* at 41, 48. This plan, however, would bring about the loss of forty-three Ambridge production workers' jobs, *id.* at 50, and Taylor knew that Local 205 was likely to object. *See id.* at 145.

Nevertheless, Taylor believed that the no-subcontracting clause, with its use of the "and/or" language underlined above, could well be interpreted by an arbitrator to allow Taylor to carry out its plan. *Id.* at 53. Forging ahead, Taylor executed a letter of intent with Borden, under which, in exchange for a $50,000 nonrefundable deposit from Taylor, Taylor would receive a thirty-day exclusive right to purchase the Youngstown

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[2] Taylor would obtain the right to use Borden's trademarks royalty-free for five years, and thereafter would pay royalties for their use. Tr. I, at 90.

plant. PX1. This option expired by its terms on September 5, 1995, but the evidence indicated that Borden would have sold the plant to Taylor as late as the fourth week of October. Tr. I, at 97; Tr. II at 93, 131. If the sale was consummated, the deposit would be applied to the purchase price. PX1, at 4; Tr. I, at 89. The sale would only close, however, if Taylor had committed financing available. PNC Bank and Milk Marketing, Inc., had committed to finance the acquisition, but the bank's willingness was contingent upon Taylor succeeding to a five-year CBA covering the bargaining unit at Youngstown. PX3, at A-3; Tr. I, at 60-62, 66.

Thus, Taylor was faced with two major labor relations tasks: bargaining through Borden with Local 377 to obtain an acceptable CBA for Youngstown, and negotiating with Local 205 to work out an arrangement under which the union would allow the production work to be moved away from Ambridge. Meetings were scheduled with both locals. on two consecutive days.

On August 24, 1995, Mr. Taylor, Taylor's labor counsel, Attorney Volk, and Gary Gleason from Borden met with representatives of Local 377, including Eben Byers, its business agent. Tr. I, at 71-72. Taylor proposed a new CBA that provided modest wage and benefit increases . *Id.* at 72, 73, 148; Tr. II, at 11. Byers was generally favorable to Taylor's plan and was willing to negotiate, although not at that point in time, as Borden was still the employer. Tr. II, at 10. Byers felt that his local could ultimately bargain for a good contract with Taylor and keep his members employed. Tr. I, at 74, 75; Tr. II, at 11-12.

Predictably, things did not go so smoothly on the Ambridge side of the negotiations, and the facts are vigorously disputed. On or before August 1, Local 205 somehow found out about Taylor's plan and contacted Fred Gegare, the IBT's Dairy Conference Director to help deal with the situation.

PX4; PX5. Gegare told someone at Local 205 that the members had the right to follow their work to Youngstown, PX5, and Lickert, Jr. passed this along to David Hershberger at Borden, *id.*[3] This was corroborated by a later Local 205 memo posted in Taylor's drivers' room, which stated that the union " has decided to back 205 members all the way. What that means is if Taylors [sic] goes to Borden so does 205." PX6. Sometime later, according to Gleason's testimony,[4]

> [u]nion members from 205 come into our property and inform[ed] my employees that their jobs were going to be gone and Local 205 was going to took [sic] over. I called Eben [Byers] and told him to get over here and bring the Teamster people over here to stop it. We were going to have a riot there. Three or four men showed; they wore their 205 shirts.

Tr. II at 164-65.

On August 25, Mr. Taylor and Attorney Volk met with representatives of Local 205 at a hotel in the Pittsburgh suburbs. Tr. I, at 76. Present for the union were, among others, Lickert, Sr., Lickert, Jr., Gegare, and Attorney David Greenberg. *Id.* Two representatives of Borden also attended the meeting, Attorney Allen Miller, then chief counsel to Borden, and Bob McInerney, a labor relations consultant. *Id.* Gegare was aware of Taylor's proposed plan because of Local 205's prior notification to him, PX4, but it was both Borden and Local 205 which invited Gegare to the meeting. Tr. II, 117; Tr. III, at 95-97. In all, there were about sixteen to eighteen people present.

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[3] Lickert, Jr. denied this conversation with Hershberger. Tr. II, at 214. I do not credit this denial.

[4] I credit this testimony. For the sake of readability, all quotations and references to testimony in this memorandum are credited by me unless otherwise stated.

The meeting was, as defendant puts it, "contentious from the beginning[.]" Dkt. no. 43, at 8. Attorney Volk opened the discussion by announcing Taylor's plan, Tr. I, at 78, 156, prompting an angry response from Lickert, Sr., who waved the CBA and arbitration award around and stated that he had a contract and wouldn't allow the plan to be implemented. *Id.* at 78-79, 156. According to Volk, "at that point or sometime in there Mr. Gegare interjected himself into the meeting[:]"

> He said, "You're not going to do that. I am giving jurisdiction of the Borden Youngstown plant to Local 205. I am implementing Article 12, Section 2 of the Teamster Constitution;[5] and if there's any negotiations, it's going to be with Bill Lickert and me."
>
> And he turned and he looked at Allan Miller and he said, "Why don't you sell it to somebody else?"

Id. at 157. Mr. Taylor has a similar recollection: "Mr. Gegare looked at Allan Miller and said, "You need to find another buyer for this plant, someone other than Taylor." *Id.* at 79. "He said that 'I am invoking Article 12, Section 2 of the IBT Constitution, and I am giving jurisdiction of the Youngstown Borden plant to Local 205.'" *Id.* at 79-80.[6] after that, the meeting quickly broke up. A few days later, Gegare sent a

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[5] Article 12, section 2 is a lengthy provision that deals with "Area, Multi-Area, Multi-Employer, National, Company-wide or Industry-wide Contracts." DX D, at 93-100. The parties agree it has no applicability to the circumstances presented by this case.

[6] Miller likewise recounted: "My recollection is the meeting was much, much shorter than I had certainly expected or hoped it would be. And Mr. Gegare made it very clear that until or unless agreements were made that were satisfactory to Mr. Lickert, there would not be any agreement." Tr. II, at 120.

letter to locals 205 and 377 which also purported to invoke article 12, section 2 of the IBT Constitution. PX8.

Defendants contend that Gegare merely told the parties that he would not permit the implementation of an "inferior" agreement at Youngstown and deny that he ever demanded that Borden sell the plant to someone else or invoked Article 12, section 2 of the IBT Constitution to award jurisdiction to Local 205. They also deny that the Local 205 demonstrators ever appeared at the Youngstown plant. While there is some evidence in the record to support defendants' position, as factfinder I find that the preponderance of credible evidence requires a contrary finding.

Gegare maintained at trial that he invoked section 10 of article 12,[7] not section 2, attributing the clear reference to section 2 in the August 28 letter to either a dictation error on his part or a transcription error by his secretary. Tr. III, at 168, 205-06. I do not find this explanation credible. The letter refers to section 2 in two separate sentences, PX8, and never mentions section 10. Either Gegare or his secretary would have to have made the same error twice, and, given the testimony of other witnesses that Gegare invoked section 2 at the meeting, I simply do not believe that Gegare's account is an accurate portrayal of what happened.[8]

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[7] Section 10 provides that when the Teamsters General executive Board learns that a local is proposing to execute a CBA that undercuts prevailing wages, it can direct the local to refrain from executing the contract, under pain of the local being placed under trusteeship if it fails to comply. DX D, at 103-04.

[8] Lickert, Sr. evidently believed that Gegare invoked sec. 2, as Lickert by letter urged him to continue asserting it. *See* PX26. Another letter from Lickert, Sr. to Union President Ron Carey took the same position. PX11.

As to whether Gegare stated that he was awarding jurisdiction to Local 205, Greenberg simply stated that he did not recall Gegare making such a statement. Tr. II, at 194. Lickert, Jr., denied that Gegare said anything about jurisdiction. *Id.* at 211. Gegare, for his part, denies it as well. Tr. III, at 165. Again, I credit the testimony of those witnesses who did recall Gegare awarding jurisdiction to Local 205.[9]

Within a few days after this meeting, Gegare contacted Byers by telephone and told Byers not to open up or renegotiate the Local 377-Borden contract, but to listen to any proposals and fax them to Gegare. Because of Gegare's position as Dairy Conference Director, and fearing that the local would be placed in trusteeship if it disobeyed, Byers complied with Gegare's instructions. Tr. II, at 16, 20. Gegare knew shortly after the August 25 meeting that a labor agreement between Borden/Taylor and Local 377 was needed in order to keep the deal from falling through. PX12; Tr. III, at 172.[10]

Gegare, however, had no authority to issue such a directive to Byers. Under the IBT Constitution, a local can be prevented only from executing, not negotiating, a CBA, and only the General Executive Board has the authority to issue such an order. PX21, at 103-04; Tr. IV, at 25. The Dairy Conference Director's authority is limited to review, not authorization. Tr. IV, at 33. Even this monitoring of negotiations requires Executive Board approval, *id.* at 34, which Gegare never obtained in this instance. *Id.* at 31. Nevertheless, Gegare told Byers that he was "in conference" with General President Ron

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[9] I also credit the testimony of those witnesses who heard Gegare tell Borden to sell the plant to someone else, and the witness who was in a position to actually see the Local 205 protesters at Youngstown.

[10] Gegare did not become aware that a CBA was actually a legal condition precedent for the deal, however, until after Taylor instituted this litigation. *Id.* at 174.

Carey, which Byers took to mean that Gegare was operating under proper authority. Tr. II, at 21-22.

On September 1, Borden and Local 377 held a meeting in which Borden's contract proposal, PX9 , drafted with Taylor's input, was presented to Byers. Tr. I, at 87. Byers considered the contract offer to be "ridiculous" and "not serious." Tr. II, at 54-55. This proposed CBA was an opening position, however, and was subject to further negotiation. *Id.* at 87-88.[11] Byers followed Gegare's instructions and did not negotiate. *Id.* at 29-30, 159-60.

Instead, Local 377 sent a letter on September 8 to Ron Carey, seeking confirmation that Gegare really was operating under proper authority and questioning the applicability of article 12, section 2. PX10. The letter, which was copied to Gegare, asked whether Local 377 could proceed with negotiations and ratifications, emphasizing the urgency of resolving the matter as soon as possible to avoid plant closure. *Id.* Local 377 never received any response to its letter. Tr. II, at 25.

Another attempt to negotiate occurred on September 15, at which time another meeting was held between Borden and Local 377. *Id.* at 28. At this meeting, Borden informed Local 377 that it planned to close the plant. Gegare had no involvement with this meeting, but Byers continued to follow his instructions not to negotiate and to relay the proposal to him. *Id.* at 29, 56-57. At this point, Borden concluded that any productive meting would have to include Gegare. *Id.* at 128-29.

Finally, a meeting was held in Wisconsin, Gegare's home base, on October 2. Byers and Gegare attended, as well as two Borden representatives, Hewitt and McInerney. *Id.* at 35.

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[11] Indeed, Byers was of the opinion that, had Gegare not interfered, Borden and Local 377 would have successfully bargained to a five-year CBA. Tr. II, at 44.

Byers was ready to negotiate a contract, *id.*, but, after a very short meeting, the foursome broke up and McInerney and Gegare negotiated alone, excluding Byers. *Id.* at 36. When they returned, Byers was told by Gegare that the union had made a proposal, PX15, that the proposal was rejected, and that the plant would close. *Id.* at 37-39. Byers wanted to negotiate further because he thought the proposal, which he had no hand in drafting except for the provision of some benefit cost figures, was unrealistic and bound to be rejected by Borden. *Id.* at 39-40. It included a "cross-docking" provision, Tr. I, at 92-92, inserted unilaterally by Gegare, Tr. III, at 185, that could have prevented Taylor from accomplishing its prime objective in acquiring the plant. Gegare, however, refused to permit any further negotiations. Tr. II, at 38.

At this point, the deal fell through and the plant closed a short time later, its customer list being sold to Dean Foods and all its employees being indefinitely laid off. Taylor then filed this suit. Its $50,000 deposit was not refunded.

II.

In my earlier memorandum denying summary judgment, I opined:

> The gravamen of plaintiff's claim is that the union unlawfully coerced a neutral party, Borden, to cease doing business with Taylor, not because of any primary dispute between Borden and the IBT, but because of a secondary dispute between the IBT and Taylor.

Taylor Milk, 988 F. Supp. at 885.[12] I also set forth the elements of the claim:

> Evaluating a § 8(b)(4)(ii) claim thus involves a two-part test, both parts of which must be satisfied : (1) whether the union's conduct was coercive; and (2) whether an object was to secondarily force a neutral person to cease doing business with another.

Id. The entire issue of defendants' liability turns on the answer to these two questions. I will analyze them in order.

A.

In order for plaintiff to prevail, it first must prove that defendants' conduct was coercive. As I stated before,

> Not all union conduct directed at a secondary employer will violate the Act. A union remains free to persuade, induce or encourage the secondary employer; only when the conduct becomes coercive is a violation made out. Coercion means no more than non-judicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure of a compelling or restraining nature. It is not necessary that the conduct itself be unlawful. An objective test is applied to such conduct: the specific language and the surrounding facts and circumstances are examined, not the subjective interpretation of the listener.

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[12] In this dispute, Taylor and Local 205 are the primary parties, and Borden is a secondary party. The union would have been free to coerce Borden with respect to any primary dispute between Borden and Local 377, but not with respect to a secondary dispute between Taylor and Local 205. The Taylor-Local 205 dispute was "secondary" only from the perspective of Borden. It is "primary" in the instant litigation.

Id. (citations and internal quotation marks omitted). Here, the question is whether, under the facts as I have found them, defendants coerced Borden not to sell the Youngstown plant to Taylor.

I note at the outset that this is not the paradigmatic case of coercion. The IBT, after all, did not threaten to picket Borden's plants unless it refused to sell Taylor the Youngstown facility. Rather, the IBT used its influence with Local 377 to prevent that local from successfully negotiating a CBA with Borden, a CBA that had to be in place before the Borden-Taylor sale could be consummated. Although the IBT's conduct may have been outside the everyday mine run of secondary boycott cases I nevertheless conclude it was coercive.

Gegare's statement that Borden should find another buyer, standing alone, might well be considered merely persuasive. But here, Gegare went much further, invoking article 12 of the IBT Constitution and preventing local 377 from negotiating with Borden until he could be present. Local 377's letter, sent in an attempt to obtain clarification from the IBT, went unanswered. Once he arrived, Gegare presented a clearly unreasonable plan on Local 377's behalf, which Borden predictably rejected. Gegare then refused to permit Byers to negotiate further. At that point, the deal was dead and the plant was to be closed. The impact of this conduct–not to mention its intent–was to apprise Borden in no uncertain terms that, if it did not end its discussions with Taylor concerning the sale of the Youngstown plant, the IBT would simply make it impossible for Borden to obtain the CBA that was needed to permit the sale to close. This was "pressure of a compelling or restraining nature. . ." sufficient to constitute coercion, and it achieved its goal. A reasonable seller, faced with the IBT's position and losing money on its plant's operations every month, could certainly be expected to do exactly what Borden did: sell the plant to another buyer who wanted only the plant's

customer list. This is particularly true given that Borden is a nationwide dairy and Gegare is the Dairy Conference Director for the IBT, a man with whom Borden would surely have to deal in the future and whose animus it likely did not wish to kindle. Accordingly, I conclude that plaintiff has proved the element of coercion by a preponderance of the evidence.

B.

The remaining question is whether an object of the IBT's conduct was to secondarily force a neutral person, Borden, to cease doing business with another, in this case, Taylor. I conclude that this secondary motive was present.

In this case, Taylor and the union became involved in a primary dispute over whether Taylor would be permitted to move its production elsewhere and ship the finished product back to Ambridge for distribution. Local 205 strongly held that his was strictly forbidden by the no-subcontracting clause of its CBA with Taylor, and may well have been correct. Taylor believed that as long as some phase of the production and distribution process was performed by Local 205 members, its obligations under the CBA were met; this, too, could have been a correct interpretation. Local 205 was entitled to assert its rights by grieving and arbitrating the matter (with the status quo maintained in the meantime), or it could have bargained with Taylor and reached a compromise. This is what commonly occurs in labor disputes.

But that is not what happened here. Instead, Gegare was interjected into the controversy, and he did not confine his assistance to the primary dispute between Local 205 and Taylor. He imposed himself and the real or perceived weight of his office into contract negotiations between Borden and Local 377, a decidedly secondary matter. Borden, which had no interest in the Local 205-Taylor dispute and merely wanted to sell its plant and local trademark rights in an operating

condition, was forced to find another buyer when Taylor stood otherwise ready, willing and able to close on the transaction. Thus, I find by a preponderance of the evidence that defendants acted with an unlawful secondary motive.[13]

C.

Hoping to avoid these conclusions, defendants argue that the statutory term "cease doing business" does not apply to a single asset sale, which they assert is all this case involves, but only to business relationships of a continuing nature. Dkt. no. 44, at 8. The sale of the Youngstown plant, however, contemplated Taylor continuing to use the Borden trademarks, Tr. I, at 90; *supra*, at 3 & n.2, which by any standard does involve a continuing relationship between the parties. Thus, defendants' argument fails as a matter of fact.

Defendants also contend that they did not have actual, contemporaneous knowledge that Taylor had only a thirty-day window in which to consummate the transaction, and thus cannot be held responsible for having "sabotaged a deal the terms of which they had no knowledge." Dkt. no. 44, at 18. This argument fails as well. Regardless of when defendants had "formal" shortly after the August 25 meeting that a labor agreement between Borden/Taylor and Local 377 was needed in order to keep the deal from falling through. PX12; Tr. III, at 172." *Supra*, at 8. Thus, I conclude that defendants knew that the Borden-Taylor deal was under some time pressure. This was sufficient to embolden them to stonewall the Local 377 CBA, believing that the entire deal could effectively be sabotaged.

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[13] A point of clarification is in order. In my summary judgment memorandum, I incorrectly referred to Taylor as the secondary party. *Taylor Milk*, 988 F. Supp. at 887. In fact, it is the primary party.

D.

Defendants also argue that their conduct could not have been the cause of the sale not being consummated. They assert that Taylor's option period was unreasonably short and that, even had Local 377 and Borden been able to bargain without interference, it is unlikely that a CBA could have been in place. Dkt. no. 44, at 16-17.

It first must be noted that the thirty day option period was not truly a "drop dead" date; "the evidence indicated that Borden would have sold the plant to Taylor as late as the fourth week of October. Tr. I, at 97; Tr. II, at 93, 131." *Supra*, at 3. Moreover, the evidence of the most recent prior bargaining between Borden and Local 377 showed that fairly extensive CBA negotiations could be concluded within about two weeks. *see* DX X; DX Y; Tr. II, at 5.

Defendants argue that "the negotiations here cast serious doubt on the likelihood that a [collective bargaining] agreement would have been reached." Dkt. no. 44, at 26. They contend that the Borden/Taylor proposal of September 1 was so concessionary that it could not be taken seriously. This ignores the fact that it was merely an opening gambit, a wish list that was subject to further negotiation. Gegare's proposed CBA of October 2 was unrealistic, too; this is the standard courtship ritual of contract negotiations. Plaintiff's witnesses, including Byers, believed that a CBA would have been reached under these circumstances had Gegare not interfered. Defendants also fault Borden for not making a counterproposal to the October 2 offer, but that argument totally ignores Gegare's position that Local 377 would not be negotiating any further. Borden's

decision to walk away at this point was certainly not unreasonable conduct, and does not negate causation.[14]

Except for Local 205 and the IBT, all other parties in interest wanted this transaction to go forward. Borden wanted to sell an operating plant, Taylor wanted a more efficient operation, and Local 377 wanted to keep its members employed. It is therefore a fair inference--based on a preponderance of credible evidence–that he parties would have bargained successfully.[15]

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[14] Alternatively, defendants contend that if Taylor wanted the acquisition to go smoothly, it could simply have assumed the existing contract as a successor. Dkt. no. 44, at 17. This argument fails because Taylor needed a five-year CBA to obtain financing, and the Local 377-Borden CBA would have expired long before five years.

[15] I note, however, that plaintiff has barely met its burden of showing causation. The record indicates that some form of arrangement with Local 205, whether achieved through bargaining or an arbitration award favorable to Taylor, was needed to permit the Youngstown-produced products to be distributed from Ambridge. *See supra*, at 2-4; Tr. I, at 53, 104. Moreover, without Ambridge-based distribution, it appears that Taylor's plan would not have been profitable. *Id.* at 181-82. Local 205, however, was under no obligation to accede to Taylor's demands, as they had a current CBA with twenty months left to run, Tr. II, at 188, and Taylor's chances of winning an arbitration were uncertain. Tr. I, at 183. As Attorney Volk stated, this is "a slender reed upon which to build a major capital investment." *Id.* Mr. Binsack opined that the lack of such an arrangement would "certainly" have en impact upon the plan's profitability, although Taylor could make its deliveries directly from Youngstown into Pittsburgh, bypassing Ambridge altogether. Tr. II, at 98. Thus, it is questionable whether, in the absence of its issues with Local 205 being resolved, Taylor would still have purchased the Youngstown plant. Nevertheless, when Messrs. Taylor and Binsack were questioned on direct examination whether Taylor would have purchased the plant if the Local *377* issues were solved (Local 205 was not included in the question), both witnesses answered in the affirmative. Tr. I, at 91; Tr. II, at 91. No attempt was made on cross examination to explore the effect, if any, of the status of the Local 205 CBA upon Taylor's decision. I therefore conclude that plaintiff has met its burden of showing causation. This could well turn out

A related argument is defendants' position that Taylor suffered no injury. Essentially, their position at trial was that the Youngstown acquisition was so economically doomed to failure that, to the extent defendants prevented it from closing, they did Taylor a favor by saving it from losing money. I reject this argument, at least at this stage of the proceedings. Taylor put up a $50,000 nonrefundable deposit, which it lost when the deal could not close. This is sufficient to establish the existence of injury *vel non*. The exact amount, if any, of that injury awaits resolution at the damages phase of the trial.

III.

Plaintiff has established, by a preponderance of the evidence, that defendants violated § 8(b)(4)(ii)(B) of the National Labor Relations Act and caused damage to plaintiff. Trial will accordingly be scheduled to determine the amount of those damages. An appropriate order follows.

ORDER

AND NOW, this 31st day of March 1999, it is hereby ORDERED and DIRECTED that:

a pretrial conference will be held in Pittsburgh, Courtroom 9, on **Thursday, April 29, 1999 at 2:30 P.M.**, limited to the issue of what damages, if any, plaintiff suffered on account of defendants' violation of § 8(b)(4)(ii)(B) of the National Labor Relations Act.

BY THE COURT,

/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

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to be a Phyrric victory in the damages phase of the trial, however, if the facts show that Taylor would not have completed the sale without a favorable CBA with Local 205.

(2)

Supreme Court, U.S.
FILED
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No. 01-546

In the Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,
Petitioners,

v.

TAYLOR MILK COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 158(b)(4)(ii)(B) makes it unlawful for a labor organization "to threaten, coerce, or restrain any person" where an object of such conduct is to force or require any person "to cease doing business with any other person ...." *Id.* Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, makes it unlawful for a labor organization to engage in any activity that violates the proscriptions codified in Section 8(b)(4) and creates for "[w]hoever shall be injured in his business or property by reason of" such activity a cause of action for damages. 29 U.S.C. § 187(b).

The United States Court of Appeals for the Third Circuit, affirming a judgment of liability under Section 303 entered by the United States District Court for the Western District of Pennsylvania, determined that the International Brotherhood of Teamsters and its Dairy Conference - USA and Canada ("IBT") engaged in coercive secondary conduct within the meaning of Section 8(b)(4) of the NLRA, with the object of forcing Borden, Inc. to cease doing business with Respondent Taylor Milk Company.

The issue presented by the Petition is simply whether the facts as found by the trial court, and affirmed by the Court of Appeals, amount to "coercion" within the meaning of the NLRA.

CORPORATE DISCLOSURE STATEMENT

Respondent Taylor Milk Company ("TMC") is a privately held Pennsylvania corporation. It has no parent corporations and no publicly traded company owns more than 10% of TMC's stock.

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COUNTERSTATEMENT OF THE CASE

In 1995, Taylor Milk Company entered into an agreement to purchase Borden, Inc.'s Youngstown, Ohio dairy plant and operations. At the time, TMC operated a dairy processing and distribution plant in Ambridge, Pennsylvania, about 40 miles from Borden's Youngstown facility. TMC's plant was antiquated and operating at beyond its efficient capacity. The Borden plant, although much newer, was underutilized and was slated to be closed by Borden if no buyer was found for it. The opportunity to purchase the Borden plant together with its existing customer base presented TMC with a unique opportunity to upgrade its physical plant and to increase its sales volume and customer base; it was a "once in a lifetime deal." Appendix, at 3a; 20a.

TMC executed a letter of intent with Borden, paid a $50,000 nonrefundable deposit to Borden for an exclusive option to purchase the Youngstown plant, and ultimately executed a definitive asset purchase agreement for the Youngstown plant. The only condition imposed by TMC's lenders on the financing for the deal was that the Borden operations have five year labor agreements in place to which TMC could succeed. *Id.* at 3a-4a; 20a-21a.

TMC's operational plan after its purchase of the Youngstown facility was to relocate much of the production performed in Ambridge to the larger, more efficient Borden plant. The Ambridge facility would have become a warehouse and distribution center for product manufactured in Youngstown. The combination of operations would have resulted in the elimination of some jobs in both facilities, with 43 of those coming from Ambridge. *Id.* at 4a; 20a.

TMC's employees in Ambridge were represented for purposes of collective bargaining by Teamsters Local 205, which was bitterly opposed to the transaction. Upon learning of TMC's intentions in respect of the Youngstown plant, and even before TMC informed it of those intentions, Local 205's leadership solicited the support of the Chairman of IBT's Dairy Conference in the ultimately successful effort to prevent Borden from negotiating new labor agreements with the Youngstown employees, thereby preventing Borden from selling the plant to TMC. The IBT, in other words, set out to coerce Borden to cease doing business with Taylor Milk because of Local 205's objections to TMC's acquisition of the Youngstown plant. *Id.* at 4a; 21a-22a.

Teamsters Local 377 was the union representing the Borden employees, and it supported TMC's purchase of the Youngstown plant in order to keep it operating and preserve jobs. The courts below both concluded that, but for the unlawful interference with the bargaining process by the IBT, Local 377 would have entered into labor agreements with Borden acceptable to TMC's lenders, thereby satisfying the condition precedent to TMC's purchase of the Youngstown plant. *Id.* at 6a; 32-33a.

The District Court found that the IBT engaged in the following conduct, the object of which was to coerce Borden, Inc. (the secondary employer) to cease doing business with the primary employer, TMC:

- Even before TMC announced its intentions to Local 205, that Local had solicited and received assurance from the IBT that it could "follow its work" to Youngstown. Appendix, 22a.

- Local 205 members traveled to Youngstown to demonstrate, and informed the employees there that "Local 205 was going to took [sic] over." *Id.*

- At a meeting among representatives of TMC, Borden and Local 205, the IBT's representative (the Chairman of its Dairy Conference) told the Borden representatives that he would not permit Borden to sell the Youngstown plant to TMC and demanded that Borden "sell it to somebody else," thereby signaling the Union's secondary motive. *Id.* at 23a.

- The IBT representative at this same meeting announced that he was "invoking Article 12, Section 2 of the IBT Constitution and giving [collective bargaining] jurisdiction of the Youngstown Borden plant to Local 205." He continued by stating that any negotiations at Youngstown with Borden would be conducted by him in conjunction with Local 205's president, in derogation of Local 377's right to represent the Youngstown employees. *Id.* The purported constitutional basis for these actions was later acknowledged to have been completely spurious. *Id.* at 25a.

- These pronouncements were memorialized in subsequent correspondence and telephonic communication from the Dairy Conference Chairman to Local 377's officials, instructing Local 377 to decline to negotiate with Borden, and to refer all contract proposals to the Chairman. *Id.* at 24a-25a. Because the Chairman had stated that he was acting under the authority of the IBT's International President, Local 377 sent a letter to that officer requesting relief from the restraints imposed on its ability to negotiate with Borden. No response was received. *Id.* at 26a.

- During the only bargaining session with Borden attended by the Dairy Conference Chairman, he deliberately excluded the representative of Local 377 who was in attendance and unilaterally proposed language that would have prevented TMC from operating the Youngstown plant in the manner it intended. He also refused to permit Local 377 to continue negotiations with Borden. *Id.* at 6a; 27a.

The objective of the IBT was publicly declared at the initial meeting among TMC, Borden and Local 205: to force Borden to sell the Youngstown plant to somebody other than Taylor Milk Company. It accomplished this objective through the novel instrumentality of one of its own local

unions which, if it had been left to pursue its own self-interest would have cooperated with Borden's effort to sell the Youngstown plant. Instead, in order to satisfy its objectives in its primary labor dispute with TMC, the IBT usurped Local 377's bargaining authority and refused to let the Local bargain the necessary labor agreements. Although "not the paradigmatic case of coercion," Appendix at 29a, the IBT's activity directed at Borden – the secondary, neutral employer – was coercive within the meaning of Section 8(b)(4)(ii) of the NLRA.

REASONS FOR DENIAL OF THE WRIT

The IBT's assertion that the lower courts' findings of a violation of Section 8(b)(4) on these facts have "created a new cause of action out of thin air," Petition at 5, simply ignores the well-settled judicial definition of the term "coerce" in Section 8(b)(4) and the wealth of precedent applying that definition. Simply stated, conduct otherwise lawful becomes illegal when undertaken for a secondary purpose. The Petition's failure to address this precedent demonstrates that it is grounded on nothing more than a disagreement with the factual findings of the trial court. The Petition identifies no conflict among the Courts of Appeals, and it fails to articulate a legitimate basis for concluding that the holdings below erroneously applied the principles of Section 8(b)(4) jurisprudence. As is demonstrated below, the decisions in this case are examples of the principled application of settled legal standards to unusual facts. There is no basis for review of the holdings below. The Petition should be denied.

A. Otherwise lawful conduct engaged in for a secondary purpose is coercive and illegal under Section 8(b)(4).

The determination of whether conduct is coercive within the meaning of Section 8(b)(4) is a question of fact. *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 321 (5th Cir. 1994); *NLRB v. Local 3, IBEW*, 477 F.2d 260, 266 (2d Cir. 1973).[1] Coercion in the 8(b)(4) context has been defined as "non-judicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in the background of a labor dispute." *Local Union No. 48, SMWIA v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964). This definition has attained wide acceptance. *E.g., Limbach Co. v. Sheet Metal Workers Int'l Assoc. (Limbach II)*, 949 F.2d 1241, 1256 (3d Cir. 1991); *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1191 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *Kentucky State District Council of Carpenters*, 308 NLRB 1129, 1130 & n.2 (1992).

Contrary to Petitioners' suggestion, it has long been settled that otherwise lawful conduct is transformed into illicit activity if engaged in for a forbidden secondary object. *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 68 (1964) ("the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise"). "Coercion under section 8(b)(4)(ii)(B) is a broad concept, and the NLRB has not hesitated to include varied forms of

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[1] This alone is a sufficient basis to deny the Writ. Sup.Ct.R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

economic pressure within the conceptual ambit." *Pye v. Teamsters Local Union No. 22*, 61 F.3d 1013, 1023 (1st Cir. 1995) (citing *International Union, United Mine Workers of America*, 304 NLRB 71, 72-73 (1991) (finding unlawful coercion where union members caused a disturbance at a motel housing striker replacements), *enforced*, 977 F.2d 1470 (D.C. Cir. 1992); *Local No. 742, United Bhd. of Carpenters & Joiners of Am.*, 237 NLRB 564, 565-566 (1978) (union's quid pro quo request for premium pay from neutral employer was coercive); *Service & Maintenance Employees Union, Local 399*, 136 NLRB 431, 436-437 (1962) (union's non-expressive marching around main entrance to sports arena, impeding public access, constituted unlawful coercion). *See also, Pye*, 61 F.3d at 1023 ("affinity group shopping," consisting of large groups of people purchasing small items with bills of large denomination, was coercive); *Limbach II*, 949 F.2d at 1256 ("We hold that the threat of cancelling their bargaining agreement could be a powerful economic weapon in the hands of the unions which, if used for prohibited reasons, constitutes coercion within the meaning of the NLRA"); *Teamsters Local Union No. 25 v. NLRB*, 831 F.2d 1149, 1154 (1st Cir. 1987) (processing of invalid grievances under labor agreement was coercive); *Carrier Air Conditioning*, 547 F.2d at 1191 (threat by union to enforce invalid no-subcontracting clause through grievance procedure was coercive).

In the present case, both the district court and the Court of Appeals concluded that the IBT's conduct was motivated by its secondary objective of coercing Borden to cease doing business with Taylor Milk Company. Appendix at 11a-12a; 30a-31a. For this reason, the decisions below do not implicate the question presented in the Petition – the conduct engaged in by the Petitioners was, in fact, unlawful. That it did not involve picketing does not mean that it was not

coercive, as the jurisprudence summarized above makes plain, and is largely irrelevant to the inquiry of whether it was engaged in for prohibited secondary reasons. IBT has presented no reason in its Petition to revisit this settled area of Section 8(b)(4) jurisprudence.

B. There is no conflict with this Court's explication of Section 8(b)(4) principles.

The Petition argues unpersuasively that the decisions below impermissibly expand the reach of Section 8(b)(4). Petition at 7-11 (citing *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964) and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988)). Examination of the decisions relied on to support the argument negates it.

In *Servette*, this Court observed that "[h]armony between [subsection 8(b)(4)] (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement of managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would 'threaten, coerce, or restrain' that exercise." 377 U.S. at 54 (footnote omitted). In the footnote, Senator Dirksen was quoted to emphasize that subsection 8(b)(4)(ii) was enacted to "'make[] it an unfair labor practice for a union to try to coerce or threaten an employer directly (but not to persuade or ask him) in order-- * * * To get him to stop doing business with another firm or handling its goods.'" 377 U.S. at 54 n.12 (quoting 105 Cong.Rec. 19849, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 1823) (ellipsis in original). Here, although IBT argues that its conduct was intended only to persuade Borden to abandon its

business relationship with TMC and thus should be insulated under subsection 8(b)(4)(i), both the district court and the Court of Appeals were unconvinced. Both found as fact that Petitioners' efforts to frustrate the transaction between Borden and TMC were coercive, and restrained Borden from doing business with Taylor Milk Company. Appendix at 9a-10a; 30a-31a. Hence, far from straying from the *Servette* rationale, the lower courts actually applied it to the facts of this case.

IBT's reliance on *DeBartolo* is equally misplaced. That case established that peaceful, non-picketing handbilling of consumers – a form of persuasive communication protected by the First Amendment – was not coercive, a proposition necessary to avoid "the serious constitutional questions" that would be present if such conduct were intended by Congress to be an unfair labor practice under Section 8(b)(4)(ii). 455 U.S. at 587. The inapplicability of *DeBartolo* to the facts of this case is readily discernible: here, there was no consumer-oriented appeal. Instead, the IBT engaged in a pattern of behind-the-scenes manipulation of its own constitutional provisions and usurped the legitimate legal authority of one of its own constituent local unions in order to apply secondary pressure to Borden, Inc., a neutral employer. There are no constitutional issues raised by IBT's conduct here. *DeBartolo* is inapposite.

Conclusion

In its decision in this case the Court of Appeals noted that "the secondary boycott provisions are directed at preventing a union from leveraging a neutral third party's relationship with a primary employer in order to force the primary employer to accede to the union's demands." Appendix at 11a (citing *Limbach II*, 949 F.2d at 1249-1250).

This is an unremarkable and correct statement of the law. The only remarkable aspect of this case is the creativity demonstrated by the IBT in its successful effort to exert secondary pressure against Borden. But this factual novelty is an insufficient basis on which to grant the petition. No novel legal issues are presented, and there is no conflict with decisions from other Courts of Appeals or with decisions of this Court. The Petition should be denied.

Respectfully submitted,

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